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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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METROPOLITAN LIFE INSURANCE COMPANY,
*Appellant*,

v.

COMMONWEALTH OF MASSACHUSETTS,
*Appellee*.

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TRAVELERS INSURANCE COMPANY,
*Appellant*,

v.

COMMONWEALTH OF MASSACHUSETTS,
*Appellee*.

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**On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts**

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## BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOLOGY, AND THE MASSACHUSETTS PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE.

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DONALD N. BERSOFF
(Counsel of Record)
KIT KINPORTS
BRUCE J. ENNIS
ENNIS, FRIEDMAN, BERSOFF & EWING
1200 - 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100
*Counsel for* Amici Curiae

January 25, 1985

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## INTEREST OF *AMICI CURIAE*

The American Psychological Association (APA) is a voluntary nonprofit, scientific, and professional organization with more than 50,000 members. It has been the major association of psychologists in the United States since 1892. The APA's purpose, as reflected in its by-laws, is to "advance psychology as a science and profession, and as a means of promoting human welfare."

The Association for the Advancement of Psychology (AAP) is a nonprofit corporation supported by the voluntary contributions of 6,000 psychologists. AAP seeks to inform the three branches of government of the ethical, professional, and scientific views of the psychological community.

The Massachusetts Psychological Association, with over 1650 members, is a state affiliate of the APA. It represents the scientific and professional interests of psychologists within Massachusetts, including psychologists working in academic and professional settings, both in public and private institutions.

*Amici* file this brief pursuant to Rule 36.2 of the Rules of this Court. The parties have consented to the filing of the brief; their consents have been filed with the Clerk.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 1973, the Massachusetts legislature enacted an insurance statute requiring all group health insurance policies to provide specified coverage for mental health benefits. *See* Mass. Ann. Laws ch. 175, § 47B (Michie/Law. Co-op. 1977) (Section 47B). The Massachusetts Supreme Judicial Court—properly in the view of *amici*—rejected appellants' arguments that this statute is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, and by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*

Although Section 47B arguably relates to employee benefit plans and therefore falls within the scope of ERISA's preemption provision, it is excepted from preemption by ERISA's insurance savings clause, which was meant to preserve the long line of state statutes, includ-

ing Section 47B, that regulate the contents of insurance policies. The one exception to the insurance savings clause, which prohibits States from deeming employee benefit plans to be insurers, does not apply to Section 47B, which regulates only insurance companies.

The decision below is additionally supported by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which represents Congress' judgment that, as a matter of federal policy, insurance regulation should be performed by the States.

This case does not involve a conflict between Section 47B and ERISA, as appellants would have this Court believe. Rather, any conflict that does exist is between ERISA and the McCarran-Ferguson Act. For this reason, this Court's usual reluctance to weigh conflicting policy considerations is particularly appropriate here.

## ARGUMENT

### I. ERISA WAS NOT INTENDED TO PREEMPT MANDATED BENEFIT STATUTES.

ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a), provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

There is no question that the benefit plans at issue here are "employee benefit plans" as defined in 29 U.S.C. § 1003. The only issues are whether Section 47B "relates to" employee benefit plans within the meaning of § 1144, and, if so, whether the statute falls within one of the express exceptions to § 1144.

#### A. Arguably, the Massachusetts Statute "Relates to" Employee Benefit Plans Governed by ERISA.

In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court held that ERISA preempted a state statute prohibiting the reduction of a retiree's pension benefits by the amount of workers' compensation awards

the retiree received subsequent to retirement. After finding that Congress had actually contemplated and approved such an offset of pension benefits, the Court concluded that the statute " 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating pension benefits . . . permitted by federal law." *Id.* at 524.

The Court's conclusion was not altered by the fact that the statute "intrudes indirectly, through a workers' compensation law rather than directly, through a statute called 'pension regulation.' " *Id.* at 525. Rather, the Court concluded that "even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." *Id.*

Then, in *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983), the Court held that the New York Human Rights Law and the State's Disability Benefits Law "related to" pension plans governed by ERISA. The Court reasoned that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 2900. Applying this definition, the Court concluded that "the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly 'relate to' benefit plans." *Id.*

ERISA does not specify which benefits must be included in employee benefit plans. Accordingly, Section 47B does not conflict with any provision of ERISA so as to "relate to" benefit plans in the sense in which that term was used in *Alessi*. But *Alessi* does suggest that the fact that the mandated benefit statute is nominally an insurance law, rather than a benefits plan law—and therefore bears on benefit plans only indirectly—would not save the Massachusetts statute from preemption under ERISA.[1] And be-

[1] Although Section 47B does require employee benefit plans to provide the mental health benefits specified in the statute, there has

cause Section 47B does require that insurance policies issued to benefit plans provide specified mental health benefits, it arguably "relates to" those employee benefit plans just as the Disability Benefits Law did in *Shaw*.

The Massachusetts statute can, however, be distinguished from the New York laws at issue in *Shaw*. New York's Human Rights Law had been interpreted by the state courts to prohibit *any* employer from maintaining an employee benefit plan that treated pregnancy differently from other nonoccupational disabilities. *See* 103 S. Ct. at 2895. The Disability Benefits Law expressly required *all* employers to provide the same benefits for pregnancy-related disabilities as for any other disability. *See id.* at 2896. The Massachusetts statute, by contrast, requires that mental health benefits be provided to only certain employees—those whose benefit plan is covered by an insurance policy. The statute thus "relates to" only those employee benefit plans, and not to benefit plans generally. Arguably, the statute's indirect relation to only a subset of employee benefit plans governed by ERISA takes it outside the scope of the preemption provision.

Most of the courts that have considered ERISA's effect on mandated benefit statutes have, however, concluded that such statutes do "relate to" employee benefit plans governed by ERISA.[2] Accordingly, although the point is

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been no attempt to enforce Section 47B against employee benefit plans and the Commonwealth apparently concedes that that part of the statute is preempted by ERISA. The Massachusetts Supreme Judicial Court, relying on state law, found that the portion of Section 47B applicable to employee benefit plans was severable from the portion applicable to insurance policies. *See Attorney General v. Travelers Ins. Co.*, 385 Mass. 598, 601, 433 N.E.2d 1223, 1225 (1982), *reprinted in* App. to Juris. Stmts. at 13a, 15a-16a. This state law ruling is binding on this Court; accordingly, the only question before the Court is the effect of ERISA on the portion of Section 47B regulating insurance policies.

[2] *See, e.g., Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem.*, 103 S. Ct. 3564 (1983); *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 766 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981); *Wadsworth v. Whaland*, 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

not free from doubt, *amici* will assume here that Section 47B does "relate to" employee benefit plans.

### B. The Massachusetts Statute Is a Law Regulating Insurance and Is Therefore Excepted from ERISA's Preemption Provision.

Even if Section 47B "relates to" employee benefit plans within the terms of the ERISA preemption provision, the statute is not preempted if it falls within one of the express exceptions to the reach of the preemption provision. The relevant exception here, the so-called insurance savings clause, is set forth in 29 U.S.C. § 1144(b)(2)(A):

> "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ."

This Court's prior decisions are of little assistance in determining whether Section 47B is a law which regulates insurance within the meaning of this savings clause. In both cases, the Court noted that state laws regulating insurance are excepted from ERISA's broad preemption provision.[3] But the insurance savings clause was not at issue in either case, and therefore the Court did not elaborate on the reach of that provision. In fact, the Court made clear in *Alessi* that it was not ruling on the applicability of ERISA's preemption provision in cases such as this. *See* 451 U.S. at 525 n. 21.

Congress' intent in excepting state laws regulating insurance from the scope of the ERISA preemption provision cannot be determined from the language of that statute. Nowhere in ERISA does Congress define the phrase "law . . . which regulates insurance" or give any clue to its meaning. But it should be noted that Congress used very broad language in the insurance savings clause: it preserves "*any* law of *any* State which regulates insurance . . . ." (Emphasis added.)

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[3] *See Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890, 2897 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n. 19 (1981).

The legislative history does not address the scope of the insurance savings clause. Until the ERISA bill emerged from confererence, every prior version of the preemption provision had superseded state law only in the specific areas regulated by ERISA. The Conference Committee broadened the preemption provision to include all state laws that relate to pension plans, rather than only those dealing with subjects regulated by ERISA, but the Committee did not comment on the reasons for the change. *See* H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5162. With respect to the insurance savings clause, the Conference Report merely states: "The preemption provisions of title I are not to exempt any person from any State law that regulates insurance . . . ." *Id.*[4]

Moreover, the Conference Committee's changes were not disclosed until the Conference Reports were filed with Congress fewer than ten days before the statute was passed in August 1974. *See* Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 115-16 (1976). Thus, "the present language of section 514 was inserted by the Conference Committee at a very late hour, after no congressional hearings, and with little explanatory comment . . . ." *Id.* at 116.[5]

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[4] The legislative history of prior versions of the preemption provision is similarly unenlightening. *See, e.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. 35, 47 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4871, 4883.

[5] In addition, Congress was preoccupied during this period with the issues arising from President Nixon's resignation on August 9, 1974. *See* 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Javits). "[I]t would be naive to suppose that during this period any serious attention could have been devoted to such matters as the status of an obscure preemption provision in a 250-page federal statute." Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 116 (1976); *see also* Okin, *Preemption of State Insurance Regulation by ERISA*, 13 Forum 652, 678 (1978); Comment, *ERISA Preemption and Indirect Regulation of Employee Welfare Plans Through State Insurance Laws*, 78 Colum. L. Rev. 1536, 1542 & n. 42 (1978) (hereafter cited as *ERISA Preemption* Comment).

The few substantive comments concerning preemption made during the debate on the Conference Reports focused on the scope of § 1144(a), not on the exceptions to preemption like the insurance savings clause. *See ERISA Preemption* Comment, *supra* note 5, at 1542 & n. 42. And the three veiled references that were made to the savings clause during the debate on the Conference Reports are not helpful in ascertaining the intended reach of that clause. *See* 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits) (referring merely to "certain exceptions . . ."); *see also id.* at 29,197 (remarks of Rep. Dent); *id.* at 29,933 (remarks of Sen. Williams). There is no indication in ERISA's legislative history that Congress recognized the tension between the preemption provision itself, which preempted any state law relating to employee benefit plans, and the insurance savings clause, which preserved all state laws regulating insurance. Thus, there is absolutely no indication that Congress intended to preempt state statutes such as this one.

The language and legislative history of the insurance savings clause therefore require a presumption that Congress intended to give the clause its ordinary meaning: the Court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. at 2900.

Interpreting the insurance savings clause according to its plain meaning indicates clearly that Massachusetts' mandated benefit statute is a law that regulates insurance within the meaning of that clause. Section 47B is contained in the chapter of the state statutes that pertains to insurance. It was proposed by the legislature's Joint Committee on Insurance. It was enacted because the legislature found that "[a] need . . . exists for all people to be safeguarded against the high and sometimes crippling costs of professional mental health care today" and that "in order for the cost to be reasonable, insurance for mental illness must be a mandatory feature on all policies sold in the state." General Court Joint Committee on In-

surance, *Advances in Health Insurance in Massachusetts* 9, 5 (Aug. 1974). And it operates by regulating the contents of insurance policies. Certainly, these factors suggest that Section 47B is a law that regulates insurance.

This conclusion is corroborated by the tradition of state insurance regulations—begun long before ERISA was enacted—that, like Section 47B, govern the contents of insurance policies in an effort to protect the interests of the insured. One commentator has noted that the first mandated benefit legislation was enacted in California in 1949. *See* Peel, *Regulatory Developments in Minimum Standards for Health Insurance Policies*, 13 Forum 680, 682 (1978). Since that time, state legislatures have passed a wide variety of mandated benefit legislation.

In Massachusetts, for example, since at least 1956 all group life insurance policies have been required to guarantee that any insured who leaves the group will remain insured under the policy for a certain period unless he is otherwise entitled to similar benefits. *See* Mass. Ann. Laws ch. 175, § 134(4) (Michie/Law. Co-op. 1977). A similar provision governing group health insurance policies was enacted in 1967. *See id.* § 110D. In 1960, the legislature enacted a statute requiring insurance policies to provide coverage for those hospitalized or receiving treatment in a state soldiers' home. *See id.* § 22. In 1962, the Commonwealth required all health insurance policies that provide for termination of a dependent child's coverage at a specified age to continue coverage if the child is "mentally or physically incapable of earning his own living on the termination date . . . ." *Id.* § 108(2)(a)(3). In 1973, in addition to enacting Seciton 47B, the legislature required all group health insurance policies to provide certain specified benefits for the treatment of alcoholism. *See id.* § 110(H). These are only some of the many provisions in the Massachusetts statutes regulating insurance that have been in existence since ERISA was enacted and that mandate specific insurance benefits.[6]

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[6] *See also, e.g.*, MASS. ANN. LAWS ch. 175, § 22 (Michie/Law. Co-op. 1977) (prohibiting certain insurance policy provisions;

Thus, "a myriad of state enactments . . . have provided for years the guidance as to what is and is not permissible in the writing of insurance for employee groups." Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 Temple L.Q. 51, 56 (1979). *See also* Okin, *supra* note 5, at 656 ("State insurance departments have long exercised jurisdiction over the content of individual and group accident and health policies issued in their state by insurance carriers.").[7]

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adopted before 1960); *id.* § 47C (requiring all group health insurance policies to provide coverage for newborn infants and adopted children, including coverage of birth abnormalities; adopted on August 9, 1974); *id.* §§ 113C, 113L (requiring all automobile insurance policies to include certain coverage; adopted in 1968); *id.* § 132(1) (requiring life insurance policies to contain a provision providing that the insured is entitled to a thirty-day grace period within which to pay any premium due after the first year; adopted by 1933); *id.* §§ 132(6), 142 (requiring life insurance policies to include a provision entitling the insured to a loan on the policy at a specified interest rate; adopted by 1943).

[7] California, Florida, Michigan, Missouri, and Virginia enacted legislation between 1968 and 1972 that requires insurers to extend major medical coverage to dependents who are disabled when they reach the age where they would otherwise be terminated from coverage under the terms of the policy. *See Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 324 n. 8 (N.D. Ind. 1977), *modified on other grounds*, 567 F.2d 692 (7th Cir. 1977); VA. CODE § 38.1-348.1 (1981). In 1971, Wisconsin required group health insurance policies to provide coverage for treatment of alcoholism, *see* WIS. STAT. ANN. § 632.89 (West 1980), and Connecticut required such policies to provide mental health benefits, *see* CONN. GEN. STAT. ANN. § 38-174d (West Supp. 1984). Since 1971, California has required that any group hospital, medical, or surgical policy provide coverage for mentally or physically handicapped dependents of the insured after the dependents reach the age of majority. *See* CAL. INS. CODE § 10277 (West 1972). In 1973, the Virginia legislature passed a statute requiring all plans for furnishing prepaid medical services to pay for services rendered by licensed psychologists, podiatrists, chiropractors, and optometrists. *See* VA. CODE § 38.1-824 (1981). Since 1973, Maryland has required all health insurance policies to provide mental health benefits, *see* MD. ANN. CODE art. 48A, § 477E (1979); Minnesota has required that

When ERISA was enacted, therefore, there was already a long tradition of state regulation of the contents of insurance policies. Congress must have been aware of that fact—especially since at that very time insurance companies and state insurance commissioners were developing policies on mandated benefit statutes.[8] And Congress was obviously aware that some pension plans might purchase insurance because ERISA defines "employee welfare benefit plan" as a plan that provides certain benefits "through the purchase of insurance or otherwise . . . ." 29 U.S.C. § 1002(1). If Congress had intended to end the States' longstanding tradition of regulating the contents of insurance policies, it would likely have limited the insurance savings clause in some fashion. *See Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. 334, 340, 463 A.2d 793, 796 (1983).[9] The fact that it did not sug-

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all health insurance policies provide coverage for treatment of alcoholism and drug dependence, *see* MINN. STAT. ANN. § 62A.149 (West Supp. 1984); and Wisconsin has required that every group health policy offer certain coverage for treatment of tuberculosis, *see* WIS. STAT. ANN. § 632.90 (West 1980).

[8] In fact, state mandated benefit statutes were sufficiently common prior to the enactment of ERISA to attract considerable attention by the insurance industry. In late 1971, the Health Insurance Association of America (HIAA), which filed an *amicus* brief in support of appellants' jurisdictional statements, appointed a Task Force on Minimum Standards for Health Insurance Policies. The National Association of Insurance Commissioners (NAIC) began deliberations on minimum standards legislation in late 1972; in December 1973, the NAIC adopted a model mandated benefit statute. In early 1974, the HIAA Task Force then began to develop its recommendations for a model statute and, in May 1974, submitted a draft to the NAIC. *See* Peel, 13 FORUM at 682-86. The *amicus* brief filed by HIAA in this case indicates that the association has a membership of 327 private insurance companies, including both appellants, and that these companies write more than eighty-five percent of the health insurance policies written by private insurance companies in this country. *See* Brief *Amicus Curiae* of Health Insurance Association of America in Support of Jurisdictional Statements at 1. HIAA's Vice President and General Counsel is Joe W. Peel, the author of the article cited above.

[9] In fact, a bill was introduced in 1979 to amend ERISA to provide that state mandated benefit statutes are not preserved by the insur-

gests that the insurance savings clause was actually intended to mean what it says and thus to preserve state laws like Section 47B.

The overwhelming majority of courts that have considered this issue have concluded that mandated benefit laws are laws that regulate insurance and thus within the scope of the insurance savings clause.[10]

### C. The Massachusetts Statute Does Not Fall Within the Scope of the "Deemer Provision."

Although Section 47B must be considered a state law regulating insurance, it is nonetheless preempted by

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ance savings clause. *See* S. 209, 96th Cong., 1st Sess. § 155, 125 CONG. REC. 933, 937 (1979). The bill was intended to overrule the court's decision in *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978). *See* 125 CONG. REC. 947 (1979) (remarks of Sen. Javits). Although the bill was reported to the Senate, it apparently died without ever being debated. *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE CALENDAR 108, 111 (final ed. Jan. 4, 1981).

Admittedly, Congress' failure to pass this bill does not necessarily demonstrate its intent that the insurance savings clause exempt mandated benefit statutes from preemption under ERISA. But this postenactment history does indicate that Congress was at least aware of the courts' interpretation of the insurance savings clause, and "it lends weight to the argument . . ." that the savings clause was intended to except mandated benefit statutes. *North Haven Board of Education v. Bell*, 456 U.S. 512, 534 (1982). Moreover, "the relatively insubstantial interest given [this portion of S. 209] seems particularly significant since Congress has proceeded to amend . . ." ERISA's preemption provision in another respect proposed by S. 209. *Id. Compare* S. 209, 96th Cong., 1st Sess. § 155, 125 CONG. REC. 937 (1979), *with* 29 U.S.C. § 1144(b)(5)(A).

[10] *See, e.g., American Progressive Life & Health Ins. Co. v. Corcoran*, 715 F.2d 784, 787 (2d Cir. 1983); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692, 700 (7th Cir. 1977); *Wadsworth v. Whaland*, 562 F.2d at 77; *St. Paul Elec. Workers Welfare Fund v. Markman*, 490 F. Supp. 931, 933 (D. Minn. 1980); *Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. 334, 344-45, 463 A.2d 793, 798 (1983); *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. 894, 901-02, 410 A.2d 635, 640 (1979) (per curiam). *But see Michigan United Food & Commercial Workers Unions v. Baerwaldt*, 572 F. Supp. 943 (E.D. Mich. 1983), *appeal docketed*, No. 83-1570 (6th Cir. Aug. 16, 1983).

ERISA if it falls within the scope of the one exception to the insurance savings clause. That exception, the so-called "deemer provision," provides that an employee benefit plan may not "be deemed to be an insurance company or other insurer, . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . . ." 29 U.S.C. § 1144(b)(2)(B).

The plain meaning of that provision indicates that it does not apply to the statute in question here. The deemer provision clearly states only that a State may not deem an employee benefit plan to be an insurance company and thereby attempt to apply its insurance laws to the benefit plan.

No legislative history suggests that the deemer provision was intended to mean anything other than what it says. The Report explaining the Conference Committee's amendments to the preemption provision merely restates the language of the deemer provision without clarifying its meaning. *See* H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5162. And there was no mention of the deemer provision either during the debate on the Conference Report or in prior Committee Reports.

Subsequent legislative history does, however, confirm that the deemer provision should be interpreted according to its plain meaning. An activities report issued in 1977 by the Subcommittee on Labor Standards of the House Committee on Education and Labor explains: "the 'deemed' language was utilized to create an irrebuttable presumption that these [employee benefit] plans are not insurance . . . for purposes of state regulation. . . . The irrebuttable presumption would not be overcome even if an employee benefit plan engages in activities which bring it within the insurance . . . activities generally regulated by a state." H.R. Rep. No. 1785, 94th Cong., 2d Sess. 47 (1977). Thus, the Report makes clear that, even though self-insured employee benefit plans may have some of the characteristics of insurance, the deemer pro-

vision prohibits a state from applying its insurance regulations to such benefit plans on the ground that they are engaged in the business of insurance.[11] The Report then goes on to point out that an insurance policy sold to an employee benefit plan *is* subject to state regulation:

> "[C]ertain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. . . . The entrepreneur will then argue that his enterprise is an ERISA benefit plan which is protected, under ERISA's preemption provision, from state regulation. . . . [T]hese plans are . . . no more ERISA plans *than is any other insurance policy sold to an employee benefit plan.*
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> "To the extent that such programs fail to meet the definition of an 'employee benefit plan,' *state regulation of them is not preempted by section 514, even though such state action is barred with respect to the plans which purchase these 'products.'*" *Id.* at 48 (emphasis added).

This subsequent history is not conclusive evidence of the deemer provision's meaning, but it does provide evidence of Congress' intent, especially in the absence of contemporaneous legislative history. *See, e.g., North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982).

Thus, the courts have interpreted the deemer provision to prohibit States from regulating self-insured employee benefit plans under their insurance laws.[12] But the ma-

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[11] *See, e.g.*, Brummond, *supra* note 5, at 77, 90-91; Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 TEMPLE L.Q. 51, 59 (1979). Because no self-insured benefit plans are involved here, the Court need not rule on the proper application of the ERISA preemption provision in cases involving self-insured plans—for example, whether the deemer provision prohibits a state from applying its insurance regulations to a self-insured benefit plan if additional factors, aside from the mere fact of self-insurance, indicate that the plan is engaged in the business of insurance. Likewise, the Court need not attempt to define precisely what is a self-insured plan.

[12] *See, e.g., Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502, 504 (9th Cir.) (per

jority of courts have also concluded that the deemer provision does not apply to mandated benefit statutes, like Section 47B, that regulate the contents of insurance policies sold to employee benefit plans.[13]

If the deemer provision is interpreted more broadly to bar state regulation of insurance policies issued to employee benefit plans, it would nullify the insurance savings clause. ERISA preempts all state insurance laws that "relate to" employee benefit plans, unless they are excepted by the savings clause. And the deemer provision prohibits States from directly regulating employee benefit plans. If the deemer provision is also interpreted to preempt all state laws that regulate the contents of insurance policies purchased by benefit plans, no state insurance laws relating to benefit plans would be left for the savings clause to save—rendering the savings clause superfluous, in violation of the well-established principle that legislation should be construed so as to give effect to each part. *See, e.g., McDonald v. Thompson*, 305 U.S. 263, 266 (1938). Thus, the deemer provision cannot be read to preempt Section 47B, and that statute must fall within the scope of the insurance savings clause.

## II. THE McCARRAN-FERGUSON ACT WAS INTENDED TO PRESERVE MANDATED BENEFIT STATUTES.

Any doubt about ERISA's effect on mandated benefit statutes is laid to rest by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which provides in relevant part:

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curiam), *cert. denied*, 439 U.S. 831 (1978); *Russo v. Boland*, 103 Ill. App. 3d 905, 909-10, 431 N.E.2d 1294, 1298 (1982).

[13] *See Wadsworth v. Whaland*, 562 F.2d at 77-78; *McLaughlin v. Connecticut General Life Ins. Co.*, 565 F. Supp. 434, 443-44 (N.D. Cal. 1983); *Eversole v. Metropolitan Life Ins. Co.*, 500 F. Supp. 1162, 1169 (C.D. Cal. 1980); *Cate v. Blue Cross & Blue Shield*, 434 F. Supp. 1187, 1190 & n. 5 (E.D. Tenn. 1977); *Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. at 344-45, 463 A.2d at 798; *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. at 902-03, 410 A.2d at 640; *ERISA Preemption* Comment, *supra* note 5, at 1540-41. *But see, e.g., General Split Corp. v. Mitchell*, 523 F. Supp. 427, 430 (E.D. Wis. 1981).

"The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *Id.* § 1012(a).

The first paragraph of the Act declares the congressional policy that "the continued regulation and taxation by the States of the business of insurance is in the public interest." *Id.* § 1011. Thus, the Act represents Congress' judgment that, as a matter of *federal* policy, the regulation of insurance should be performed by the States.[14] Congress recognized that the States had traditionally exercised this power[15] and wanted to ensure the preservation of such authority in the States,[16] which, in Congress' view, were best able to undertake such regulation.[17] As this Court noted in *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 68 (1959), "[w]hen the States speak in the field of 'insurance,' they speak with the authority of a long tradition."

The McCarran-Ferguson Act is helpful in determining the reach of ERISA's preemption provision for two additional, independent reasons. First, the meaning of the McCarran-Ferguson Act's reference to state "laws . . . which relate to the regulation . . . of [the] business [of insurance]," 15 U.S.C. § 1012(a), aids in defining the meaning of the similar phrase, state "law which regu-

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[14] *See, e.g.*, H.R. REP. NO. 143, 79th Cong., 1st Sess. 3, *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 670, 672; S. REP. NO. 1112, 78th Cong., 2d Sess. 3, 7 (1944); 90 CONG. REC. 6525 (1944) (remarks of Rep. Walter); *SEC v. National Securities, Inc.*, 393 U.S. 453, 458 (1969).

[15] *See, e.g.*, H.R. REP. NO. 143, 79th Cong., 1st Sess. 2, *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 670, 670-71; S. REP. NO. 1112, 78th Cong., 2d Sess. 2 (1944) (noting that the States "have regulated insurance for over 90 years . . .").

[16] *See, e.g.*, H.R. REP. NO. 873, 78th Cong., 1st Sess. 6 (1943); 89 CONG. REC. 10,659 (1943) (remarks of Rep. Miller).

[17] *See, e.g.*, S. REP. NO. 1112, 78th Cong., 2d Sess. 5, 7 (1944); 90 CONG. REC. 6524 (1944) (remarks of Rep. Walter).

lates insurance," found in the insurance savings clause.[18] Second, the final paragraph of ERISA's preemption provision indicates that Congress expressly intended that ERISA not alter or impair any federal statute, including the McCarran-Ferguson Act. *See* 29 U.S.C. § 1144(d).

### A. The Relevant Caselaw Compels the Conclusion that Section 47B Is a Statute that Regulates the Business of Insurance.

This Court's decisions interpreting the McCarran-Ferguson Act have identified three criteria relevant in determining whether a particular practice falls within the Act's reference to the "business of insurance": "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (emphasis in original). Mandated benefit statutes like Section 47B satisfy all three criteria.

The first criterion was set forth in detail in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 212, 211 (1979), where the Court noted that one "indispensable characteristic of insurance" is "the spreading and underwriting of a policyholder's risk." Section 47B unquestionably relates to the spreading and underwriting of risk. The statute reflects a legislative judgment that the costs of mental health care should be underwritten by health insurance policies and that the risk of costly mental health care should be shared. *See* General Court Joint Committee on Insurance, *Advances in Health Insurance in Massachusetts* 5 (Aug. 1974); Superior Court Findings & Conclusions, *reprinted in* App. to Juris. Stmts. at 36a, 50a-51a. It therefore requires that insurance policies insure against "the risk that policyholders will be unable

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[18] *See, e.g., Marks v. United States*, 161 U.S. 297, 302 (1896); *McLaughlin v. Connecticut General Life Ins. Co.*, 565 F. Supp. 434, 443 (N.D. Cal. 1983); *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. 894, 901, 410 A.2d 635, 639 (1979) (per curiam).

to pay for [the cost of mental health care] during the period of coverage." *Royal Drug*, 440 U.S. at 213. By requiring certain coverage in all insurance policies, Section 47B "defines the scope of risk assumed by the insurer from the insured" and has a direct impact on "the measure of the risk" that is transferred to the insurer. *Pireno*, 458 U.S. at 131, 130.

The second criterion was set forth in detail in *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), where the Court noted that the McCarran-Ferguson Act "was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'" Congress' "focus," the Court continued, "was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'" *Id.*

Section 47B clearly falls within the scope of this criterion. The statute "centers around the contract of insurance" by prescribing terms that must be included within that contract, and it determines "the type of policy which [can] be issued." And Section 47B is an attempt by the legislature to "secure the interests of those purchasing insurance policies," *id.*, by requiring that the insurer provide certain safeguards to all policyholders. Unlike *Pireno*, therefore, this case involves a statute that is "an integral part of the policy relationship between the insurer and insured." 458 U.S. at 131.

The third criterion is likewise present in this case. Mandated benefit statutes impose requirements solely on insurers, and their purpose is to affect only the relationship between insurers and their policyholders; they do not "inevitably involve[] third parties wholly outside the insurance industry . . . ." *Id.* at 132.[19]

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[19] *See also, e.g., Feinstein v. Nettleship Co.*, 714 F.2d 928, 932 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2346 (1984) (noting that

Thus, this Court's prior decisions interpreting the scope of the McCarran-Ferguson Act indicate clearly that Section 47B is a law that regulates the business of insurance and is not to be superseded by any federal statute. This conclusion has likewise been reached by the vast majority of courts which have considered the question whether the type of benefits offered by an insurance policy fall within the scope of the McCarran-Ferguson Act. In *Grant v. Erie Ins. Exchange*, 542 F. Supp. 457 (M.D. Pa. 1982), *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 104 S. Ct. 349 (1983), for example, the plaintiffs challenged the defendant insurance companies' refusal to provide insurance coverage for work loss benefits to persons who died in automobile accidents. Noting that "'[m]atters of . . . extent of coverage . . . go to the very heart of the relationship between the insurance company and the policyholder . . . ,'" the court held that the McCarran-Ferguson Act was applicable in that case. *Id.* at 462 (quoting *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 369 (E.D. Pa. 1976)).[20]

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the term "entities within the insurance company" includes insurers and insureds).

[20] Likewise, in *Anglin v. Blue Shield*, 693 F.2d 315 (4th Cir. 1982), the plaintiff challenged Blue Shield's refusal to offer him a policy protecting himself and his minor child; Blue Shield would offer such a policy only if it also covered the plaintiff's wife. The court concluded that the McCarran-Ferguson Act was applicable because "[t]he allegations in the plaintiff's complaint are the very essence of the relationship between insurer and policyholder. He has alleged that Blue Cross/Blue Shield has refused to offer the exact coverage that he prefers." *Id.* at 320.

*See also, e.g., Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468, 476 (5th Cir. 1979), *cert. denied*, 446 U.S. 987 (1980); *Lowe v. Aarco-American, Inc.*, 536 F.2d 1160, 1162 (7th Cir. 1976); *Addrisi v. Equitable Life Assurance Soc'y of United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Dawson v. Whaland*, 529 F. Supp. 626, 632 (D.N.H. 1982); *Pierucci v. Continental Casualty Co.*, 418 F. Supp. 704 (W.D. Pa. 1976); *New Hampshire-Vermont Health Service v. Whaland*, 119 N.H. 886, 893, 410 A.2d 642, 647 (1979) (per curiam); P. AREEDA, ANTITRUST LAW: AN

### B. The Legislative History Compels the Conclusion that Section 47B Is a Statute that Regulates the Business of Insurance.

The legislative history of the McCarran-Ferguson Act provides further confirmation that Congress intended that federal laws like ERISA should not interfere with state statutes like Section 47B. Although the phrase "laws . . . which relate to the regulation . . . of [the] business [of insurance]" is not defined in the legislative history of the McCarran-Ferguson Act, that history indicates that Congress clearly understood that the Act would protect state laws regulating the terms and contents of insurance policies and the types of coverage and benefits offered. For example, Sen. Ferguson, one of the sponsors of the Act, observed that "a state law relating to . . . the fixing of the terms of a contract of insurance . . . would be permitted . . . ." 91 Cong. Rec. 480 (1945).[21] As this Court noted in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430 (1946), "Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation . . ." when it enacted the McCarran-Ferguson Act.

Moreover, that Act was intended to give the States very broad power to regulate the business of insurance. "The unequivocal language of the Act suggests *no* exceptions." *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 653 (1981) (emphasis added). Thus, Sen. Ferguson noted that the Act gave the States "full power to act by legislation . . . ." 91

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ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 43 (1982 Supp.); Brummond, *supra* note 5, at 104; Manno, *supra* note 11, at 53.

[21] *See also, e.g.*, 90 CONG. REC. 6561 (1944) (remarks of Rep. Anderson) ("the States [do] have a right to control risks . . . and all the other things which the average insurance men recognize come under State regulations"); *id.* at 6528 (remarks of Rep. Miller); *id.* at 6536 (remarks of Rep. Howell); *id.* at 6538 (remarks of Rep. Springer); *id.* at 6546 (remarks of Rep. Voorhis); *id.* at 6556 (remarks of Rep. Graham).

Cong. Rec. 1481 (1945).[22] And throughout the legislative history, the observation was frequently made that the Act was meant to give the States broad discretion "to regulate insurance as they each see fit." S. Rep. No. 1112, 78th Cong., 2d Sess. 5 (1944).[23]

Moreover, the latitude given the States to regulate the business of insurance was not meant to apply only to the precise forms of state regulation in existence in 1945 when the McCarran-Ferguson Act was passed. Rather, the Act was intended to permit the States to take steps to resolve any unforeseeable problems that might face the insurance industry in the future. *See* 91 Cong. Rec. 483 (1945) (remarks of Sen. Radcliffe). Congress therefore recognized that the States would continue to make use of "experimentation" in regulating insurance, S. Rep. No. 1112, 78th Cong., 2d Sess. 6 (1944), to ensure "[p]rogress in insurance," which "can be made only by constantly liberalizing coverage and constantly reducing costs." 90 Cong. Rec. 6550 (1944) (remarks of Rep. Ploeser). Thus, "enactment of the McCarran-Ferguson Act 'put the full weight of [Congress'] power behind existing *and future* state legislation . . . .'" *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. at 654 (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. at 431) (emphasis added).

The McCarran-Ferguson Act was also meant to protect state insurance laws from preemption by federal statutes that might later be enacted. Thus, Sen. Ferguson explained, "if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be af-

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[22] *See also, e.g.*, 91 CONG. REC. 483 (1945) (remarks of Sen. Radcliffe); 90 CONG. REC. 6559 (1944) (remarks of Rep. Sumners); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 551 (1978) (referring to "the overall framework of plenary state regulation . . .").

[23] *See also* 91 CONG. REC. 1481 (1945) (remarks of Sen. Ferguson); 90 CONG. REC. 6418 (1944) (remarks of Rep. Allen).

fected . . . ." 91 Cong. Rec. 481 (1945).[24] The McCarran-Ferguson Act therefore "remov[ed] obstructions [to state regulation of insurance] which might be thought to flow from [Congress'] power, whether dormant or exercised, except as otherwise expressly provided in the Act itself *or in future legislation.*" *Prudential Ins. Co. v. Benjamin*, 328 U.S. at 429-30 (emphasis added).[25]

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[24] Although the McCarran-Ferguson Act provides that a federal law that "*specifically relates* to the business of insurance" may be construed to preempt state insurance regulations, 15 U.S.C. § 1012(b) (emphasis added), that provision is not applicable in this case. ERISA is not a law that specifically relates to the business of insurance. Rather, ERISA specifically relates to employee benefit plans. Moreover, it is difficult to understand how ERISA can be viewed as a statute explicitly designed to repeal the McCarran-Ferguson Act and to preempt state insurance regulations when ERISA expressly indicates *no* intent to displace state insurance laws and *no* intent to supersede the McCarran-Ferguson Act. *See Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979); *Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

Two courts have found that some portions of ERISA do specifically relate to the business of insurance within the meaning of the McCarran-Ferguson Act. *See Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831 (1978); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 320 n. 1 (N.D. Ind. 1977), *modified on other grounds*, 567 F.2d 692 (7th Cir. 1977). But neither court articulated a persuasive rationale for its conclusion.

[25] The portion of the McCarran-Ferguson Act providing that the Act does not "affect in any manner the application to the business of insurance . . ." of the NLRA is not relevant to this case—even though some of the employee benefit plans that purchase insurance policies from appellants are the result of collective bargaining. 15 U.S.C. § 1014. That provision was meant to codify this Court's decision in *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944), which held that the labor relations of insurance companies are subject to the NLRA. *See, e.g.*, 91 CONG. REC. 1090 (1945) (remarks of Rep. Gwynne); 90 CONG. REC. 6419 (1944) (remarks of Rep. Allen); Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 594. Thus, that section provides only that the McCarran-Ferguson Act does not "jeopardize the rights of insurance workers . . ." under the NLRA; it therefore has no application

Thus, the McCarran-Ferguson Act was drafted to protect the long tradition of state regulation of the business of insurance. Because mandated benefit statutes like Section 47B regulate the business of insurance within the meaning of the McCarran-Ferguson Act, that statute requires, as a matter of federal policy, that such state statutes be preserved. Thus, this case involves more than a conflict between a state law—Section 47B—and a federal law—ERISA. Rather, it involves a conflict between two federal laws—ERISA and the McCarran-Ferguson Act. Resolution of such a conflict might be difficult if Congress had not indicated on two separate occasions in ERISA that the important policies underlying the McCarran-Ferguson Act should prevail. Given the two express exceptions to the reach of ERISA's preemption provision—the insurance savings clause and the provision indicating that ERISA is not intended to impair any federal law—any conflict between ERISA and the McCarran-Ferguson Act must be resolved in favor of the latter, and therefore in favor of mandated benefit statutes like Section 47B.

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to this case. 90 CONG. REC. 6526 (remarks of Rep. Brehm). *See also, e.g., Women in City Gov't United v. City of New York*, 515 F. Supp. 295, 304 (S.D.N.Y. 1981); *John Hancock Mutual Life Ins. Co. v. Commissioner of Ins.*, 349 Mass. 390, 397-98, 208 N.E.2d 516, 522 (1965).

Likewise, the NLRA does not itself preempt Section 47B. *See Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978) (noting that "nothing in the NLRA . . . expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining," and that in another statute, the predecessor to ERISA, Congress had "recognized and preserved state authority to regulate pension plans . . ." without distinguishing those established by collective bargaining); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 n. 23 (1981) (noting that where Congress preserves the States' role, the NLRA does not preempt state regulation).

## III. APPELLANTS' NARROW READING OF THE INSURANCE SAVINGS CLAUSE IS UNSUPPORTABLE.

Appellants propose that ERISA's insurance savings clause be construed to preserve only "the traditional areas of state insurance regulation . . ."—for example, "licensing and examination of insurers, . . . minimum capital and surplus requirements, . . . [and] general oversight of insurance companies." Brief for Appellant Metropolitan Life Insurance Co. at 34-35. There is absolutely no support for this exceedingly narrow reading of the savings clause.

### A. The Statutory Language, Legislative History, and Judicial Construction of the Relevant Statutes Do Not Support Appellants' Reading of the Insurance Savings Clause.

Appellants' proposed construction of the savings clause distorts the plain meaning of that clause, which broadly preserves "any law of any State which regulates insurance . . . ." It cannot be read to preserve only those insurance laws that are to appellants' liking.

Moreover, appellants' interpretation of the insurance savings clause renders it completely superfluous. ERISA's preemption provision supersedes only those state laws that "relate to" employee benefit plans. But the types of insurance regulations appellants consider "traditional" are in no way related to employee benefit plans. Rather, they relate solely to insurance companies. If the insurance savings clause is interpreted to preserve only those types of insurance regulations, it has no meaning whatsoever because such regulations are not even arguably preempted by ERISA.

In addition, there is no support for appellants' limited definition of traditional areas of state insurance regulation. In fact, there is a very long tradition of state statutes, like Section 47B, that prescribe the contents of insurance policies and that mandate that certain benefits be included in those policies. *See SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 79 (1959)

(acknowledging "[t]he traditional state insurance department regulation of contract terms . . ."). That tradition was solidly established when ERISA was enacted in 1974—and even when the McCarran-Ferguson Act was enacted in 1945. If Congress had meant to exclude such traditional forms of state insurance regulation from the savings clause, it certainly would have so stated and would not have applied that clause to "any law of any State which regulates insurance . . . ." [26]

### B. The Relevant Policy Considerations Do Not Support Appellants' Reading of the Insurance Savings Clause.

Because appellants' construction of the insurance savings clause is not supported by the relevant statutory language, legislative history, or caselaw, they perforce rely on policy considerations supposedly favoring their reading of that clause. But "[t]hese policy considerations were for Congress to weigh, and [this Court is] not free to ignore the language and history of [ERISA and the McCarran-Ferguson Act] even were [the Court] to disagree with the legislative choice." *North Haven Board of Education v. Bell*, 456 U.S. 512, 536 n. 26 (1982). Moreover, "[r]eferral to the legislators is particularly appropriate in this case, as the policy aspects may not be as one-sided as those painted by [appellants]." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 256 n. 26 (1979) (Brennan, J., dissenting).

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[26] In a case similar to this one, this Court rejected the Federal Government's narrow reading of the term "health insurance" as it appeared in another federal statute. The Court relied on the absence of a definition of the term in the statute or legislative history, and on the lack of support for the limited definition in the statutory language or legislative history. Accordingly, the Court concluded that the Federal Government had "offer[ed] no persuasive reasons why the term 'health insurance' in [26 U.S.C.] § 22(b)(5) should be limited to the particular forms of insurance conventionally made available by commercial companies." *Haynes v. United States*, 353 U.S. 81, 84 (1975). Similar reasoning requires rejection of appellants' narrow definition of the term "insurance" in the insurance savings clause.

Leaving the task of balancing the relevant policies to Congress is additionally appropriate in this case because it involves a conflict between two federal statutes and because Congress has already rejected attempts to amend ERISA so as to preempt state mandated benefit laws. *See* note 9, *supra*. Because *amici* believe that this Court should not involve itself in weighing the conflicting policy considerations at issue in this case, we discuss them only briefly and limit the discussion to points not addressed in the *amicus* brief of the Committee for Comprehensive Insurance Coverage.

Appellants' construction of the insurance savings clause would create an immense regulatory vacuum in the field of insurance. It would result in the preemption of all state statutes prescribing the contents of insurance policies—at least insofar as those statutes applied to policies sold to employee benefit plans governed by ERISA. For example, the statutes cited at pages 8-10 above would all be subject to preemption.[27] There is no federal system for the regulation of insurance to replace this comprehensive and traditional scheme of state regulation. And ERISA does not attempt to control the substance of health and welfare benefits. In fact, the bulk of ERISA is directed at pension plans, not at welfare plans like those at issue in this case.[28] Ceasing all governmental regulation of welfare benefit plans, other than ERISA's disclosure and

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[27] Appellants' attempt to dismantle the traditional state regulation of the contents of insurance policies, leaving no federal regulation in its place, is the latest in a long line of attempts by the insurance companies to avoid regulation. *See, e.g., Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648-49 (1944); 90 CONG. REC. 6537-38 (1944) (remarks of Rep. Celler); Weller, *supra* note 25, at 590, 592, 614.

[28] The statute's title suggests that Congress was primarily concerned with pension benefit plans. Moreover, the scarcity of regulatory provisions applicable to welfare benefit plans and the congressional hearings indicate that reform of private pension plans was Congress' main objective. *See* Brummond, *supra* note 5, at 61-63, 114, 115; *ERISA Preemption* Comment, *supra* note 5, at 1536 n. 4, 1546 n. 70.

fiduciary requirements, is completely inconsistent with the legislative history of the McCarran-Ferguson Act, which indicates that Congress wished to avoid "the grave danger, unless something is done at once, that the insurance companies will be absolutely unregulated." 90 Cong. Rec. 6548 (1944) (remarks of Rep. Hobbs). It is likewise inconsistent with the legislative history of ERISA, which indicates that Congress wished to preserve the existing scheme of state insurance regulation, and that Congress was concerned with the inadequacy of governmental regulation of employee benefit plans, *see, e.g.*, 29 U.S.C. § 1001.[29]

Appellants' proposal would be exceedingly difficult to administer. In defining "the traditional areas of state insurance regulation," they suggest a distinction between "the wide range of state laws designed to protect the insurance purchaser from improper or imprudent conduct by the insurance company" and "state laws whose purpose and effect is to control plan content or the relationship between the plan itself and the plan's beneficiaries." Brief for Appellant Metropolitan Life Insurance Co. at 34. Not only is state control over the content of insurance policies a traditional area of state insurance regulation, but the very purpose of such control is to protect the purchaser of insurance. Accordingly, appellants' attempted distinction has no meaning. Even appellants concede that their construction of the insurance savings clause may lead to "difficult line-drawing problems." *Id.* at 35.

In addition to ignoring the substantial policies disserved by their reading of the insurance savings clause, appellants exaggerate the importance of the policies allegedly supporting their proposal. Appellants argue, for example, that mandated benefit statutes make it more difficult for interstate employers to provide uniform benefits

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[29] *See also Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. 334, 343-44, 463 A.2d 793, 798 (1983); *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. 894, 903, 410 A.2d 635, 640 (1979) (per curiam).

and therefore create increased administrative costs for such employers. Although Congress may have wished to minimize the need for interstate employers to administer their plans differently in different states, it was also willing to sacrifice that interest to accommodate the States' interests. For example, ERISA permits continued enforcement of state laws relating to workmen's compensation, unemployment compensation, and disability insurance, although they vary substantially from state to state. *See* 29 U.S.C. § 1003(b)(3). Moreover, the insurance savings clause permits the States to enforce at least some insurance laws relating to employee benefit plans, even though those laws likewise differ among the States. Thus, "[m]ere incantation of the congressional goal of uniformity in regulation cannot resolve this question of statutory construction." *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 706 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

Moreover, because state laws have traditionally prescribed the contents of insurance policies, diversity in this area has long been the norm for interstate employee benefit plans. And it was precisely such diversity that the McCarran-Ferguson Act was intended to preserve.[30] There is no evidence in ERISA's legislative history that Congress intended to sacrifice this diversity; in fact, Congress' concern for uniformity appears to have been limited to regulation of benefit plans, and not to regulation of insurance companies selling policies to those plans. *See, e.g.*, 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams).

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[30] *See, e.g., Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946) ("Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise expressly provided for"); 90 CONG. REC. 6418-19 (1944) (remarks of Rep. Allen); *id.* at 6550 (remarks of Rep. Robsion); *id* at 6551 (remarks of Rep. Ploeser).

Appellants also argue that mandated benefit statutes encourage employee benefit plans to become self-insured. However, there is no evidence in ERISA's language or legislative history that self-insurance is contrary to Congress' intent. In fact, Congress clearly recognized that some employee welfare benefit plans would not purchase insurance policies. *See* 29 U.S.C. § 1002(1). Moreover, the States have every incentive to discourage self-insurance to maximize the impact of mandated benefit statutes and other state insurance regulations, as well as to prevent "a loss of revenue from the traditional state source of insurance company taxation, the premium tax . . . ." Okin, *supra* note 5, at 671.

Thus, although judicial balancing of the countervailing policy considerations is especially inappropriate in this case and should instead be left for Congress, the relevant policies support the decision below.

## CONCLUSION

*Amici* urge this Court to affirm the decision below.

Respectfully submitted,

DONALD N. BERSOFF
(Counsel of Record)
KIT KINPORTS
BRUCE J. ENNIS
ENNIS, FRIEDMAN, BERSOFF & EWING
1200 - 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100
*Counsel for* Amici Curiae

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